

SERVED: July 31, 2000

NTSB Order No. EA-4847

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of July, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15603
v.)	
)	
ALAN N. KACHALSKY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., issued at the conclusion of an evidentiary hearing held on October 7, 1999.¹ By that decision, the law judge affirmed the

¹ A portion of the transcript containing the initial decision is attached. Respondent filed a timely Notice of Appeal on October 12, 1999, and submitted an appellate brief on December 17, 1999. The Administrator filed a reply brief opposing respondent's

Administrator's allegation that respondent violated sections 91.119(a), 91.119(c) and 91.13(a) of the Federal Aviation Regulations (FAR), on July 26, 1998, when he operated an aircraft at low altitude in Gardiner, New York.² The law judge modified the Administrator's sanction, reducing it from a 60-day suspension of respondent's commercial pilot certificate to a 45-day suspension.³

It is undisputed that on July 26, 1998, respondent piloted a

(..continued)
appeal on January 18, 2000.

² Sections 91.119(a), 91.119(c) and 91.13(a), 14 C.F.R. Part 91, state in pertinent part:

§ 91.119 Minimum Safe Altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

- (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

* * *

- I. (b) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.13 Careless or reckless operation.

- I. (a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ The Administrator's original order suspended respondent's commercial pilot certificate for a period of 60 days because of FAR violations allegedly occurring in Gardiner, New York, on two dates: July 26, 1998, and August 3, 1998. At the commencement of the hearing, the Administrator withdrew all allegations

Cessna 150M aircraft over a sparsely populated area in Gardiner, New York, so that Vincent Occhiuto could take pictures of a dwelling. However, respondent denies that he flew the aircraft within 500 feet of any dwelling or person (Tr. 288-91, 324), and argues that the law judge's determination is not adequately supported by a preponderance of the reliable, probative and substantial evidence. Respondent also argues that the law judge deprived him of a fair hearing.⁴ The Administrator urges the Board to uphold the law judge's initial decision. After careful consideration of respondent's arguments, we deny his appeal and affirm the law judge's initial decision.

At the hearing, three eyewitnesses testified on behalf of the Administrator. All three witnesses testified that on July 26, 1998, a single engine aircraft fitting the description of respondent's aircraft made several low passes in a sparsely populated area located near Burnt Meadow Road.

The Administrator's first witness, Jennifer Cottingham,

(..continued)
pertaining to the August 3, 1998 flight.

⁴ We find no merit in respondent's claim that the law judge deprived him of a fair hearing by: 1) refusing to admit into evidence an affidavit from a doctor of optometry, which states that a person with 20/20 vision should easily be able to read 12 inch high letters on an eye chart at a distance of 400 feet; 2) allowing Administrator's witness to testify about a pending million dollar lawsuit filed against the witness by respondent; or by, among other things, 3) unduly interfering with the questioning of witnesses. The law judge's rulings and participation in the questioning of witnesses were all within his discretion in conducting the proceeding. 49 C.F.R. § 821.35(b).

testified that while working in her barn around 11:00 a.m. on July 26, 1998, her daughter called her attention to a low-flying aircraft.⁵ Mrs. Cottingham further testified that she initially did not see the aircraft, but as she walked from the barn toward her house she heard the children screaming and saw a very low-flying white aircraft with red markings come from the northeast corner of the barn. Using the height of the barn as a point of reference,⁶ Mrs. Cottingham estimated that the aircraft was flying at an altitude of approximately 100 feet above ground level. According to Mrs. Cottingham, she did not hear any noise from the aircraft's engine at first. The aircraft glided through the air making a slight descent, then she heard the engine engage and observed the aircraft climb to as high as 250 to 300 feet above ground level. Mrs. Cottingham testified that the aircraft repeated this maneuver several times, making approximately five passes over her property and other neighboring properties. Mrs. Cottingham testified that the aircraft looked as if it was going to crash or was trying to land. (Tr. 26, 31-42.)

⁵ Mrs. Cottingham's daughter and two other children, all under the age of 10, were on horseback awaiting riding lessons when the low-flying aircraft passed over the property. Mrs. Cottingham testified that her daughter called her out of the barn to ask whether she and the other children should dismount from their ponies because of the low-flying aircraft. Mrs. Cottingham further testified that she has taught the children to dismount in unsafe situations. (Tr. 30-32, 73; Administrator Exhibit (Adm. Ex.) 2.)

⁶ The barn is approximately 35 to 40 feet tall. (Tr. 34.)

The Administrator's second witness, Conrad Gustafson, who was at the Cottingham's farm on the day in question, corroborated Mrs. Cottingham's testimony. Mr. Gustafson testified that he was also in the barn when he heard some commotion. He went out of the barn and noticed an aircraft flying just above the trees.⁷ Mr. Gustafson estimated that the aircraft was flying at an altitude between 100 and 200 feet above the surface. He further testified that the aircraft made several low passes over the Cottingham's property. Like Mrs. Cottingham, Mr. Gustafson believed the aircraft was trying to make an emergency landing or was going to crash. (Tr. 85-93.)

The Administrator's third witness, Clyde Cottingham, testified that upon hearing the children and his wife screaming and upon seeing the low-flying aircraft, he ran from the barn to his house to get binoculars so that he could get the low-flying aircraft's registration number. (Tr. 138, 140-142, 153, 157.) With the assistance of binoculars, Mr. Cottingham was able to record the registration number.⁸ (Tr. 142-143, 159.) According to Mr. Cottingham, the aircraft made six to ten passes over his property at an altitude of approximately 60 feet. (Adm. Ex. 4.)

Respondent testified that he never flew less than 500 feet

⁷ The trees are approximately 45 to 60 feet tall. (Tr. 88.)

⁸ Mr. Cottingham inadvertently recorded the aircraft registration number as N83700. The true number is N8730U. (Adm. Ex. 4.) There is, however, no issue that respondent's aircraft was properly identified.

laterally from the dwelling that was being photographed and was no less than 1,300 feet from the Cottingham's property.⁹ (Tr. 288-291.) According to respondent, his altitude was approximately 250 feet and higher. (Tr. 289-290.) Respondent further testified that he was "gliding . . . reducing [engine] power to descend and get a frontal view [of the house]," then he applied power and climbed out. (Tr. 292.) Respondent testified that he did not see any people or horses in the area. However, he was initially concerned about one house that was located across the street from the dwelling that was being photographed, but respondent testified that he made sure that he stayed 500 feet away from the house that he was concerned about. (Tr. 289-292.)

Respondent's argument concerning the sufficiency of the evidence is merely a challenge against the law judge's credibility determination. It is well settled that credibility determinations are within the exclusive province of the law judge and will not be overturned unless they are arbitrary, capricious, inconsistent with the overwhelming weight of evidence, or not in accordance with law. See Administrator v. Horton, NTSB Order No. EA-4832 at 4 (2000); Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Indeed, after noting that the testimony of the

⁹ Respondent's testimony is supported by the testimony of Mr. Occhiuto, who was a personal friend and passenger in his aircraft on July 26, 1998.

Administrator's witnesses and respondent's witnesses was diametrically opposed (Tr. 358, 359), the law judge concluded that "there was no way [he could] reject the testimony of three eyewitnesses." (Tr. 360.) Respondent points to nothing that justifies a reversal of the law judge's credibility determinations.¹⁰ The witnesses' testimony and documentary evidence adequately support the Administrator's allegation that respondent violated sections 91.119(c) and 91.13(a).¹¹

There is also ample evidence in the record to support the law judge's finding that respondent operated his aircraft below an altitude that would allow for an emergency landing without undue hazard to property or persons on the surface in violation of § 91.119(a). To prevail on this allegation, the Administrator did not have to show that it would have been impossible for respondent to make an emergency landing without damage or injury to property or persons on the surface in the event of engine failure. Administrator v. Michelson, 3 NTSB 3111, 3114 (1980). The Administrator only had to show that an emergency landing from the altitude at which respondent passed through the area

¹⁰ Contrary to respondent's assertion, the mere fact that the witnesses had problems reading the aircraft's registration number does not, in and of itself, establish that the aircraft's altitude was 500 feet or higher. See Administrator v. Nelson, NTSB Order No. EA-4533 at 4 (1997).

¹¹ Respondent's violation of section 91.119(c) is sufficient to support a "residual" or "derivative" violation of section 91.13(a). Administrator v. Nelson, NTSB Order No. EA-4533 at 5.

presented an unreasonable risk of such harm. Id. In reaching his decision that the Administrator established a violation of 91.119(a), the law judge noted that the evidence shows that respondent's flight path carried him so close to people on the surface that they were placed in fear and apprehension. (Tr. 360.)

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision of the law judge is affirmed; and
3. The 45-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹²

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

¹² For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).